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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-1433

DONALD GEORGE MASKENY, LEE DURWOOD HARVEY, MARK TIMOTHY PERKINS, SIDNEY LARRY PERNELL, BARRY WAYNE TOOMBS, JULIAN THOMAS PERNELL, AND TONY DARWIN,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

SUPPLEMENTAL PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The Petitioners, Donald George Maskeny, Lee Durwood Harvey, Mark Timothy Perkins, Sidney Larry Pernell, Barry Wayne Toombs, Julian Thomas Pernell and Tony Darwin, bring the following new case law to the Court's attention. This Court's decision in *Payton v. New York*, No. 78-5420, 48 U.S.L.W. 4375 (April 15, 1980), requires further consideration of the search and seizure issue addressed by the Court of Appeals in this case.

The companion petitions of the petitioners filed March 14 and March 31 are incorporated herein by reference.

QUESTION PRESENTED

Whether this Court's decision in *Payton v. New York* requires the Court below to reverse its decision that the search of the locked briefcase was properly admissible evidence?

ADDITIONAL FACTS

After petitioners were arrested, handcuffed and given their Miranda warnings, a Customs agent noticed a briefcase on top of a counter in the terminal. None of the petitioners identified the briefcase, choosing instead to remain silent as was their prerogative under Miranda. Because they were handcuffed, they had no opportunity to remove anything from the briefcase. (T.160). Some of the petitioners asked for a lawyer before the briefcase was opened. (T.173). Nevertheless, the Customs agent tried to open the briefcase, but discovered that it was locked. (T.148). The Customs agent then gave the briefcase to DEA agent Driver.

DEA agent Driver then took the briefcase and transported it to a Georgia Highway Patrol office in Statesboro, where it was opened. Neither Driver nor Customs agent Nolan who opened the briefcase knew whether the briefcase had been seen coming out of the airplane. (T.184-185). Driver admitted that he was not sure if he could have gotten a search warrant because, "We had no probable cause." (T.174).

The prosecution maintained that the briefcase was opened to determine ownership. (T.183). Yet, the agent

who opened the briefcase said that he heard nothing while opening the briefcase which indicated that the officers were attempting to ascertain ownership. (T.183). Although the prosecution argued that the briefcase was abandoned and thus justifiably opened, the only authority which the Customs agent gave for his entry into the briefcase was his authority as a Customs Officer. (T.183).

Once the briefcase was broken open, the officers discovered aeronautical charts, Bahamian customs papers and Bahamian immigration papers for petitioners Maskeny, Perkins and Darwin. (T.526-527). These items were the only evidence tending to connect petitioners and the aircraft in a question outside of the territorial limits of the United States.[1] The government admitted that the contents of the briefcase were critical to its case.[2]

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[1] The standing of petitioners Harvey, Pernell, Toombs and Pernell is based on *United States v. Jones*, 352 F. Supp. 369, 376 (S.D. bar 1972), *aff'd* 481 F.2d 1402 (5th Cir. 1973), where Chief Judge Lawrence determined that where, in the course of a joint trial, a defendant with standing successfully moves to suppress evidence, suppression is required as to all defendants. Such a result is mandated by the overwhelming prejudice that would result if the evidence were inadmissible as to the aggrieved person but was admissible as to his co-defendants.

[2] "THE COURT: How critical are the contents to the Government's case?

"MR. McABEE: Your honor, the Government feels that the contents of the case are critical in that they form the basis for the importation count. The documents seized in the briefcase indicate that the aircraft in question had been out of the Country. That the aircraft in question had landed some three hours before it came to Sylvania in Rock South, Bahama Islands. The . . .

"THE COURT: I think you are mighty, mighty, shakey . . ." [T.149]

ADDITIONAL REASON FOR GRANTING THE PETITION

INTRUSION BY LAW ENFORCEMENT OFFICERS INTO A LOCKED BRIEFCASE WITHOUT A WARRANT VIOLATES THE SAME FOURTH AMENDMENT PRINCIPLES AS INVASION OF THE PRIVACY OF ONE'S HOME OR OFFICE.

Initially, it must be realized that the Court of Appeals' adoption of a border search justification for the search of the briefcase is questionable in light of the trial judge's reservation after he made the ruling. After Judge Lawrence had admitted the briefcase and its contents into evidence, he began to doubt the correctness of that decision.[3]

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[3] "THE COURT: . . . I think what you all argued the other day is possibly erroneous. I don't say it is, and I'm speaking of the broad interpretation you give to the 19 U.S.C. 482 Customs Searches, because that applies at borders. I don't think that applies anywhere." [T.512]

Petitioner's Motion for Directed Verdict again raised the issue, at which time the following colloquy took place:

"THE COURT: I blame myself, if there is any error there, because I followed the Government's argument without really looking up the law, except my general knowledge of it.

"And, they informed me that only a suspicion was necessary and that the powers were very broad with regard to a search and seizure by customs officials—that's not the law at all.

"MR. RIGAU: . . . it is still not too late at this point to grant the motion for mistrial.

"THE COURT: I have crossed the Rubicon on that." [T.702]

". . . [T]hey should have, in my opinion not opened that briefcase under those circumstances. But I have made that ruling . . . ." [T.703]

As to the contents, the Court related:

[footnote continued]

The question of whether a search was made at a functional border equivalent revolves around whether the Customs Agent involved knew for a "reasonable certainty" that the vessel which had been searched had crossed in to United States territory. *United States v. Tilton,* 534 F.2d 1363, 1366 (9th Cir. 1976). In determining the legality of a warrantless Customs search, "the issues of functional equivalency and reasonable basis must be judged according to the information known to [the Customs Agent] at the time he gave the signal for the interception and seizure." *United States v. Tussell,* 441 F. Supp. 1092, 1107 (M.D. Pa. 1977), relying on *United States v. Brennan,* 538 F.2d 711 (5th Cir. 1976), *cert. denied,* 429 U.S. 1092 (1977).

In this case, the Customs Officer who seized the briefcase testified that at the time of the seizure she had "no knowledge or proof" who the case belonged to or that the briefcase had even come off the aircraft in question. (T.163). The Customs Agent who later searched the briefcase sometime later, miles from the arrest, testified simply that he felt he had, under his powers as a Customs Officer, the authority to open the briefcase without a warrant. (T.187). The Customs Agents involved testified that they had no idea where the plane had come from; they did not see the briefcase being removed from the airplane, and identified it only

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"It was the fruit of the poisonous tray." [*sic*] [T.704]

and further:

"Well, I made my decision. It may be wrong, but I've got to stick by that. As a matter of fact, it couldn't be cured now." [T.713]

Although the Court felt that error may have been committed, the motion for mistrial was denied (T.702) and, consequently, petitioners were convicted on all counts of the Indictment. (R.683)

as a common aeronautical briefcase. (T.183-186). Therefore, they did not have knowledge to a "reasonable certainty" that it had come from abroad.

In applying *Almeida-Sanchez v. United States,* 413 U.S. 266 (1973), the Fifth Circuit in *United States v. Brennan, supra,* held that a search at an airport which was not a functional border equivalent did not possess characteristics of a border search and could not be supported even under the broad powers which United States Customs Officers possess. In reaching its determination that Melbourne Regional Airport was not a functional border equivalent, the Fifth Circuit held that there must be a showing that the aircraft in question flew nonstop from outside the country, or that agents possessed a "necessary degree of certainty" that it did. (538 F.2d at 715).

In the instant case, there was no showing whatsoever that any of the flights landing at Plantation Field were international in origin. As in *Brennan,* no flight plan had been filed which could be used to show the pilot intended to cross the border. *Brennan* held that the mere assumption that the flight was international in origin was, "simply too attenuated . . . to support [a] search as one occurring at a functional border equivalent of an international border." Without the contents of the briefcase, the government in this case had no articulable facts that the aircraft came from outside the border.

Therefore, we must consider this search under the standards enumerated in *United States v. Chadwick,* 433 U.S. 1 (1977), as modified by this Court's recent decision in *Payton v. New York, supra.* In *Payton,* Justice Stevens noted the distinction between a warrantless seizure in an open area and such a seizure on private premises, quoting with approval language from *G.M.*

Leasing Corp. v. United States, 429 U.S. 338, 354 (1975):

> It is one thing to seize without a warrant property resting in an open area . . . and it is quite another to effect a warrantless seizure of property . . . situated on private premises to which access is not otherwise available for the seizing officer.

That a locked briefcase constituted "private premises" should be clear after Chief Justice Burger's opinion in *Chadwick:*

> "In this case, important Fourth Amendment privacy interests were at stake. By placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides." [433 U.S. 11]

In *Payton,* this Court stated that if federal officers were free to search without a warrant merely upon probable cause to believe that certain articles were within a home, the provisions of the Fourth Amendment would become empty phrases, and the protection it affords largely nullified. 48 U.S.L.W. at 4379 n.26.

In this case, the same rationale applies. If officers are free to search a locked briefcase without a warrant and without any probable cause to believe that articles within the briefcase may be incriminating, the same Fourth Amendment protections are endangered. In *United States v. Berry,* 560 F.2d 861 (7th Cir. 1977), Federal

agents removed a briefcase from appellant's car eight minutes after the arrest and opened it. The Court stated:

> . . . [A]s was true of the footlocker in *Chadwick*, the privacy interest in the attache case here centered on its contents rather than on the container itself. A search of the interior constituted a far greater intrusion into the Fourth Amendment values than either [the] arrest or the impoundment of the case . . . . The warrantless search of the attache case in police custody cannot be justified as a search of [the] person . . . . [560 F.2d at 864]

Payton firmly states that absent exigent circumstances, the threshold of the home may not reasonably be crossed without a warrant. 48 L.W. 4380. A locked briefcase is merely an extension of the home or office. Under *Payton*, it, too, cannot be broken into without a warrant in the absence of exigent circumstances. Since the officers had complete control of the briefcase in this case and in fact transported it approximately forty-five miles before it was opened, there were no exigent circumstances. Therefore, it should not have been opened without a search warrant.

CONCLUSION

In light of this Court's opinion in *Payton v. New York, supra*, certiorari should be granted to consider the constitutionality of the search in this case.

Respectfully submitted,

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